United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-7142

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ANTHONY HERBERT,
Plaintiff-Appellee,

—against—

BARRY LANDO, MIKE WALLACE AND CBS INC.,
Defendant-Appellants.

ON APPEAL, PURSUANT TO 28 U.S.C. § 1292(b), FROM AN INTERLOCUTORY ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

B PLS

REPLY BRIEF OF DEFENDANT-APPELLANTS BARRY LANDO, MIKE WALLACE AND CBS INC.

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UNITED STATES COURT OF APPEALS
FILED
JUN 16 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

Dated: June 16, 1977

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REPLY BRIEF OF DEFENDANT-APPELLANTS BARRY LANDO, MIKE WALLACE AND CBS INC.

The briefs before the Court on this interlocutory appeal are already lengthy and we see no need to add extensively to our prior submission. As might be expected, plaintiff's brief errs in a fashion akin to the opinion it seeks to support. The District Court's opinion erroneously concluded that cases such as *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974) and *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94 (1973) which recognized sweeping constitutional protection for editorial process decisions of the press, had "nothing to do" with the question of when those same decisions must be disclosed pursuant to court order. Plaintiff's brief similarly urges that *Tornillo, DNC* and the variety of First Amendment cases cited in our main brief stem from some "other, distinct areas of law" (Br. p. 35) and that "media liability under *Sullivan* and its progeny has not been affected by *Tornillo.*" (Br. p. 29)

Such assertions simply miss the point. We do not, of course, urge that *Tornillo* reversed *Sullivan,* or, indeed, that it "affected" the substantive law of libel to be applied to this case. What we do urge is that in resolving the difficult question of "first impression" raised by this case* as to the proper scope of pre-trial discovery into editorial process decisions of the press, cases such as *Tornillo* which articulate the broadest First Amendment protection for precisely such decisions are, at the very least, relevant and that such cases may hardly be ignored on the basis of a view of pre-trial discovery which would permit discovery as to "'almost anything'". (JA 200a) Phrased differently, our assertion to this Court that this appeal is governed by First Amendment principles of long standing does not ask the Court to consider "other, distinct areas of the law"; it asks the Court to do no more than to consider First Amendment cases in determining a First Amendment issue.**

At the heart of plaintiff's position seems to be the implicit assertion that the impact of the First Amendment in libel cases is confined to questions relating to ultimate

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* Plaintiff's intimation (Br. p. 22) that Judge Haight erred in characterizing the case as one of first impression is puzzling, not to say unsupported by the cases relied upon. Many of the cases adverted to by plaintiff (Br. pp. 25-26) do not even involve discovery at all; others do not involve discovery ordered over objection; still others do not involve discovery relating to the editorial judgment of journalists such as is involved on this appeal. Nor do we suggest that discovery—even extensive discovery—is impermissible against defendants in *Sullivan*-governed libel suits: the elephantine record on appeal to this Court, including almost three thousand pages of deposition testimony already had of Mr. Lando, together with 240 exhibits introduced at his deposition, should surely bear ample witness to that.

** Plaintiff's inexplicable reading of a recent discussion of *Tornillo* in the Yale Law Journal errs similarly. Whatever else may be said of that book review, it does not conclude that "cases involving the editorial process fall into three categories, each involving a different degree of First Amendment protection" (Br.

liability. This proposition is simply not correct. Plainly, the requirements for liability set forth in *Sullivan* provide a significant aspect of the framework within which discovery and other procedural questions must be assessed. But the substantial recognition accorded First Amendment concerns with respect to liability by that decision was not intended to preclude—and has never before been held to preclude—consideration of such concerns as they relate to other aspects of the litigation process.

This has been explicitly recognized in judicial rulings. The Court of Appeals for the District of Columbia Circuit in *Washington Post Co.* v. *Keogh,* 365 F.2d 965 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 1011 (1967)* thus observed that:

> "One of the purposes of the [*Sullivan*] principle, in addition to protecting persons from being cast in dam-

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p. 29) and that libel cases are the second category. What the Review does argue is that *First Amendment* cases fall into three categories and that the greatest protection is provided the press with respect to its editorial decision-making process—precisely what is at issue on this appeal. *See* Abrams, *In Defense of Tornillo,* Book Review, 86 Yale L. J., 361, 366-67 (1976). Nor is plaintiff any more accurate in attributing (Br. pp. 21-22) either to CBS on this appeal or to an article of counsel to one of the *amici* supporting CBS's position the proposition that confidential sources in libel cases are required to be disclosed upon a showing of "(1) relevancy, (2) materiality, and (3) unavailability of information from other non-media sources". The CBS brief (pp. 21-28), speaks for itself; Mr. Goodale's conclusion was that with one exception "the newsman's privilege in civil libel cases seems to be developing on the familiar basis of (1) relevancy, (2) exhaustion of alternate sources, and (3) a compelling interest in the testimony, that is, that it goes to the heart of the matter (*Garland, Carey, Buchanan*) and is not for the purpose of forcing disclosure of sources (*Cervantes*)." Goodale, *Branzburg* v. *Hayes and the Developing Qualified Privilege for Newsmen,* 26 Hasting L.J. 709, 739 (1975).

* The *Keogh* case is one of many holding that summary procedures are particularly favored in libel cases. See our main brief at p. 19.

> ages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes. All persons who desire to exercise their right to criticize public officials are not as well equipped financially as the Post to defend against a trial on the merits. Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is 'hardly less virulent for being privately administered.' Smith v. People of State of California, 361 U.S. 147, 154, 80 S.Ct. 215, 219, 4 L.Ed.2d 205 (1959)." (365 F.2d at 968)

The same recognition that the significance of First Amendment considerations in libel cases extends beyond the standards for liability has been recognized in a discovery context. In *Cervantes* v. *Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973) the Court's concern for the damage to First Amendment protected rights which would result from application of ordinary discovery rules to a *Sullivan* libel case led it to affirm the denial of the discovery of a confidential source. And, as we noted in our main brief (p. 19 *et seq.*), a host of cases have reflected the special attention required in libel cases if undue chilling is not to result from the litigation process itself—quite apart from the merits of the suit.

In our main brief, we advised the Court that we were not asking it to review discovery rulings of the district court as to each specific question in dispute. Accordingly, we did not deal at length with the facts of the case, nor extend our brief with voluminous citations of the record in an effort to deal at any length with those facts. Plaintiff has responded by devoting almost one-fourth of his brief to assertions as to his view of the facts (Br. pp. 9-16; 45-48) and to adding three pages of "Exhibits", none of which was before the district court.

Plaintiff's brief alleges, at length, that the program reflected a "consistent pattern of disregard, distortion and omission". (Br. p. 10n) We do not believe that the record in any way supports these allegations. We do believe that the significant "disregard, distortion and omission" which are manifest in portions of plaintiff's brief reflect both the substantive weakness of plaintiff's position and the wisdom of an approach which does not burden this Court with the consideration of factual issues not adjudicated or even adverted to below. The problem may best be illustrated by plaintiff's treatment of an alleged failure to report on the program certain comments by Herbert's superior, Colonel Franklin, a matter which would seem to lie at the heart of plaintiff's theory of the case. In his brief (pp. 12-13) plaintiff asserts that the program:

> "presented a portion of a filmed interview with Franklin . . . in which he stated that Herbert never discussed with him war crimes or atrocities (JA 52a). However, in a second filmed interview of Franklin by Lando, Franklin admitted that he frequently would 'tune-out, tune-off' when Herbert was talking and that it was certainly possible that Herbert could have made comments criticizing the ARVN (the South Vietnamese Army) or American advisers about the mistreatment of the Vietnamese. . . ."

Although the brief barely stops short of saying so, the clear implication of this portion of plaintiff's brief is that CBS had in its possession an interview in which Col. Franklin "admitted" that Herbert could have made charges of atrocities to him.

In fact, however, in the second interview referred to by plaintiff, Col. Franklin explicitly rebutted this possibility, stating: "you do not tune out when somebody talks about six people getting killed" (Ex. 102, p. 3). This point was emphasized by Col. Franklin at three separate points in this second interview. (Ex. 102, pp. 3, 9, 11-12)*

That neither this brief nor this appeal generally is the appropriate forum for the resolution of the conflicting views of the parties is illustrated by the example discussed above; that forum is the district court. For purposes of this appeal, we repeat our view that (a) the district court's opinion does not reflect consideration of *any* of the alleged facts set forth in plaintiff's brief**; (b) that such "facts" in any event should be considered by the district court and

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* Plaintiff also found it unnecessary to include in his brief any reference to the fact that in the same interview, Col. Franklin also said that Herbert had been at the scene with a prisoner who had obviously been beaten up (p. 4), that Herbert was the only person put in for a medal for his participation in the disputed February 14, 1969 action (p. 10), that Herbert would tell incredible stories, which were patently false (pp. 2-3)—and that while these three comments and others by Col. Franklin were clearly anti-Herbert, the program did not advert to *any* of them.

** Plaintiff goes so far as to suggest that the applicability of a case such as *Cervantes* v. *Time, Inc., supra,* is questionable since "the substantiality of Herbert's case on the merits is evident from the record which was before Judge Haight." (Br. p. 49 n*) Judge Haight, however, made no finding whatever to this effect. Indeed, the district court did not inquire in the slightest into the "substance" of plaintiff's libel allegations and did not require any "concrete demonstration" of need for the material. *Cervantes* holds that both such findings are required.

not by this Court on appeal; and (c) that if, in fact, plaintiff were currently able to demonstrate all the facts plaintiff's brief urges are already established, the need for the testimony at issue on this appeal would, at the very least, be far less urgent than plaintiff suggests.

Finally, we turn to the recent decision of this Court in *Edwards* v. *National Audubon Society, Inc.*, Docket Nos. 77-7018, 77-7034 (2d Cir. May 25, 1977). With respect to so recent a decision of this Court, we might ordinarily simply advert to it and permit the Court to draw its own conclusions as to its applicability to the instant appeal. However, plaintiff's suggestion (Br. p. 50) that *Edwards* in some fashion supports his submission is totally insupportable.

Edwards takes on particular significance because one of the major supports for Judge Haight's ruling that the discovery sought here was appropriate was his apparent belief that ultimate liability could be premised on a finding that a reporter did not himself believe an accurately rereported statement made by a responsible official (*e.g.*, an Army spokesman). Thus, Judge Haight wrote, in emphasizing what he viewed as the relevance of inquiring into judgments as to an interviewee's veracity:

> "It is no answer for the defendants to say that they accurately repeated the words of certain of their interviewees. In *Goldwater* v. *Ginzburg, supra,* the Second Circuit observed:
>
> " 'Repetition of another's words does not release one of responsibility if the repeater knows that the words are false or inherently improbable, *or there are obvious reasons to doubt the veracity of the person quoted or the accuracy of his reports. St. Amant* v. *Thompson, supra* at 732, 88 S.Ct. 1323.' 414 F.2d at 337 (emphasis added).

> "The lines of inquiry under discussion are entirely appropriate to Herbert's efforts to discover whether Lando had any reason to doubt the veracity of certain of his sources, or, equally significant, to prefer the veracity of one source over another." (JA 202a)

The error of Judge Haight's conclusion as to this is made evident by this Court's decision in *Edwards*.

Edwards involved the accurate reporting by the New York Times of defamatory falsehoods made by officials of the National Audubon Society against three prominent scientists who were active in the national debate over the use of DDT. This Court reversed a jury finding of liability against the Times and an Audubon executive. That finding had followed a charge to the jury which directed them to find the Times to have acted with actual malice towards the defendant if its reporter had serious doubts as to the truth of the Audubon charges he correctly reported, even if he had no doubts as to the accuracy of his report. In Chief Judge Kaufman's opinion for a unanimous panel of this Court, it was concluded that:

> "Succinctly stated, when a responsible, prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity. *See Time, Inc.* v. *Pape*, 401 U.S. 279 (1971); *Medina* v. *Time, Inc.*, 439 F.2d 1129 (1st Cir. 1971). What is newsworthy about such accusations is that they were made. We do not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth. Nor must the press take up cudgels against

> dubious charges in order to publish them without fear of liability for defamation. *Cf. Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them." (Slip op. at 3769-70)

This language makes clear that a fundamental premise of Judge Haight's opinion was simply unsound. In itself, this would require a remand.

Edwards also bears generally upon the discovery rulings yet to be made by the district court if, as we urge, this Court remands to that court with directions to reconsider the specific discovery issues raised on this appeal, giving due regard to First Amendment considerations. *Edwards* will then be apposite, since the district court will presumably take this Court's *Edwards* ruling into account in assessing the possible irrelevance of various questions—*e.g.*, whether CBS "believed" in the Army position or not.

Finally, *Edwards* is relevant in setting the mood with which this appeal, as well, should be viewed. It is one of a series of very recent decisions by this Court* which has recognized with striking sensitivity the fragility of the liberties protected by the First Amendment and the care which must be taken to preserve the robust debate that Amendment would foster. The ruling of the district court simply does not reflect any such sensitivity to the First Amendment issues raised by this appeal.

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* *Buckley* v. *Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 97 S.Ct. 785 (1977); *Hotchner* v. *Castillo-Puche*, 551 F.2d 910 (2d Cir. 1977). *Cf. Baker* v. *F&F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

CONCLUSION

This appeal plainly involves far more than whether one journalist in one case should be obliged to be deposed for still a 27th day, notwithstanding the fact that the extraordinary length of the deposition itself is suggestive of the need, at long last, to call it to a halt. Nor are the issues raised ones which are unique to this case or its facts or its parties. The decision of the district court is a sweeping one which is—and unless reversed, presumably will be—as applicable in libel actions by powerful public officials as it is to this plaintiff and as applicable to suits against small and easily threatened defendants as it is to this defendant. It is a dangerous ruling which we urge this Court to reverse.

Respectfully submitted,

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Dated: June 16, 1977

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-against- : 77-7142

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Defendant-Appellants. :

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROBERT F. BELLUSCIO, being duly sworn, deposes and says:

1. I am over the age of 18 years and not a party to this action.

2. On the 16th day of June, 1977, I served two (2) copies of the annexed Reply Brief upon:

Green & Hillman
1270 Avenue of the Americas
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Coudert Brothers
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Cohn, Glickstein, Lurie,
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by depositing true and correct copies thereof in the United States Post Office at 73 Pine Street, New York, New York, enclosed in stamped, sealed envelopes addressed to the above-mentioned attorneys.

Robert F. Belluscio

Sworn to before me this
16th day of June, 1977

Robert R. Cawthra, Jr.
Notary Public

ROBERT R. CAWTHRA, JR.
Notary Public, State of New York
No. 31-0602710
Qualified in New York County
Commission Expires March 30, 1979